[Cite as *State v. Gonzales*, 2018-Ohio-4867.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106760

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SHEILA GONZALES

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-621499-A

BEFORE: McCormack, P.J., S. Gallagher, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: December 6, 2018

ATTORNEY FOR APPELLANT

Joseph V. Pagano
P.O. Box 16869
Rocky River, OH 44116

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor

By: Anna Woods
Assistant County Prosecutor
Justice Center, 9th Floor
1200 Ontario Street
Cleveland, OH 44113

TIM McCORMACK, P.J.:

{¶1} Defendant-appellant Sheila Gonzales appeals her sentence, arguing in one assignment of error that the imposition of consecutive sentences is contrary to law.

{¶2} On September 25, 2017, Gonzales was charged in a 12-count indictment charging four counts of aggravated robbery, three counts of felonious assault, two count of theft, two counts of kidnapping, and one count of receiving stolen property. The charges stem from two incidents where Gonzales targeted two different victims, pretending to ask for directions and then snatching the victims' purse or wallet. The first victim, a 70-year-old male, was dragged alongside Gonzales's car when she attempted to grab his wallet and drive away. The victim's wife witnessed the incident. As a result of Gonzales's actions, the victim suffered severe injuries for which he spent five days in an intensive care unit. The second victim, a female, was also dragged along side Gonzales's vehicle when Gonzales, once again, attempted to grab the

victim's purse and drive away. As reported by the prosecutor, the victim's purse was wrapped around her arm and, had she let go of the purse, her head would have hit the concrete and her arm would likely have gone under the vehicle's tires. This victim suffered panic, fear, and terror as a result of her encounter with Gonzales.

{¶3} On December 27, 2017, Gonzales pleaded guilty to an amended indictment that included two counts of robbery (amended Counts 1 and 7), and felonious assault (Count 3), and unauthorized use of a vehicle (amended Count 12). The court imposed a prison sentence of two years, concurrently, on Counts 1 and 3; two years on Count 7, to be served consecutively to Counts 1 and 3; and six months on Count 12, to be served concurrently with Count 7. The total sentence is four years.

{¶4} Gonzales now appeals the imposition of consecutive sentences, arguing that the trial court failed to make the statutorily mandated findings and the record does not support the trial court's findings.

{¶5} In reviewing felony sentences, we apply the standard of review set forth in R.C. 2953.08(G)(2). *State v. Wright*, 8th Dist. Cuyahoga No. 106175, 2018-Ohio-965, ¶ 9; *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 9. Under R.C. 2953.08(G)(2), an appellate court may increase, reduce, modify a sentence, or vacate and remand for resentencing if we clearly and convincingly find that the record does not support the sentencing court's statutory findings under R.C. 2929.14(C)(4) or the sentence is contrary to law. *State v. Johnson*, 8th Dist. Cuyahoga No. 102449, 2016-Ohio-1536, ¶ 9. The imposition of consecutive sentences is contrary to law if a trial court fails to make the findings mandated by R.C. 2929.14(C)(4). *State v. Morris*, 2016-Ohio-7614, 73 N.E.3d 1010, ¶ 24 (8th Dist.), citing

State v. Bonnell, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37. The trial court must also incorporate the findings into the journal entry of sentence. *Bonnell*.

{¶6} R.C. 2929.14(C)(4) provides that the trial court must find that consecutive sentences are necessary to protect the public from future crime or to punish the offender, that such sentences would not be disproportionate to the seriousness of the conduct and to the danger the offender poses to the public, and that one of the following applies:

> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under postrelease control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶7} Compliance with R.C. 2929.14(C)(4) requires the trial court to make the statutory findings at the sentencing hearing, "and by doing so it affords notice to the offender and to defense counsel." *Bonnell* at ¶ 29. A trial court is not required to give a "talismanic incantation of the words of [R.C. 2929.14(C)(4)], provided that the necessary findings can be found in the record and are incorporated in the sentencing entry." *Id.* at ¶ 37.

{¶8} Regarding the court's findings, Gonzales concedes the court made the third finding under R.C. 2929.14(C)(4). She argues, however, that the trial court failed to make the first and second findings mandated by statute.

{¶9} Here, we find the record reflects that the trial court did indeed make the third finding when it stated:

> the basis for [the consecutive sentence] is the fact that at least two of these offenses were committed as part of one or more courses of conduct and that the harm caused by two or more of these multiple offenses was so great or unusual that no single prisons sentence would adequately reflect the seriousness of your conduct.

{¶10} Regarding the first finding, the record reflects that the trial court did not specifically find that "consecutive sentences are necessary to protect the public from future crime or to punish the offender." In imposing sentence, however, the court explained why community control was not an option, stating that Gonzales had previously violated her community control because she had not availed herself of the opportunity for drug treatment while on community control for "drug-related offenses." And while acknowledging that Gonzales was "clean" now, the court stated, "I still feel that we have to provide some punishment for the crimes you committed before." This statement, although not explicitly provided in the same language as the statute, arguably satisfies the first finding under R.C. 2929.14(C)(4).

{¶11} Regarding the second finding, the state contends that the trial court satisfied the "disproportionate" finding when it stated:

> I'm giving you close to the minimum on this because you did not choose to become drug addicted and because your record does not show violent crime other than this one-day episode. Also, the fact that you seem to recognize what you have done and are taking steps to correct that.

{¶12} The second finding of the statute requires the trial court find that sentences would not be "disproportionate to the seriousness of the conduct and to the danger the offender poses to the public." R.C. 2929.14(C)(4). In the court's statement above, the trial court referenced the seriousness of Gonzales's conduct. However, the court failed to address the danger Gonzalez

poses to the public. And there is nothing in the record to indicate that the trial court considered the proportionality regarding the seriousness of Gonzalez's conduct and the danger she poses to the public. Although the use of "talismanic" words is not necessary, it must be clear from the record that the trial court actually made the required statutory findings. *State v. Carrion*, 8th Dist. Cuyahoga Nos. 103393 and 103394, 2016-Ohio-2942, ¶ 20. We note that the court's sentencing entry states, "Consecutive sentences are not disproportionate to the seriousness of Defendant's conduct and to the danger Defendant poses to the public"; however, this finding must be made at the sentencing hearing *and* incorporated into the entry. *Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, at syllabus.

{¶13} Because we find the trial court did not make the proportionality finding required by R.C. 2929.14(C)(4), the sentence is contrary to law. We therefore vacate the sentence and remand the case for the trial court to consider whether consecutive sentences are appropriate under R.C. 2929.14(C)(4), and if so, to make the required findings on the record and incorporate those findings into the court's sentencing entry. *See Bonnell*.

{¶14} Gonzales's sole assignment of error is sustained.

{¶15} Judgment reversed and remanded to the trial court for resentencing consistent with this opinion.

It is ordered that appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

TIM McCORMACK, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR